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April 3, 2019

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: *South Carolina Coastal Conservation League, et al. v. South Carolina Public Service Commission, et al.*; Appellate Case No. 2018-001165

South Carolina Solar Business Alliance, LLC, v. South Carolina Coastal Conservation League, et al.; Appellate Case No. 2018-002117

Dear Mr. Shearouse:

On behalf of South Carolina Electric & Gas Company, enclosed for filing in the above-referenced matters, which were consolidated by way of this Court's Order dated January 31, 2019, please find the original and one (1) copy of the **Initial Brief of Respondent South Carolina Electric & Gas Company** and **Designation of Matter to be Included in the Record on Appeal**. Please note that Respondent's Brief addresses the brief filed by Appellants South Carolina Coastal Conservation League and the Southern Alliance for Clean Energy as well as the brief filed by the Appellant South Carolina Solar Business Alliance, LLC.

Please acknowledge receipt of the enclosed documents by file stamping the extra copy of same and returning it to me via my courier.

(continued...)

By copy of this letter, I am serving counsel of record for all parties and enclose a Proof of Service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer

JMSH/cgc
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The Honorable Jocelyn Boyd, Clerk for the SC Public Service Commission

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case Nos. 2018-001165 and 2018-002117

Commission Docket No. 2018-2-E

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy,.....Appellants,

v.

South Carolina Public Service Commission, South Carolina Electric & Gas Company, CMC Steel South Carolina, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, LLC, Southern Current, LLC, and South Carolina Office of Regulatory Staff, ...Respondents;

and

South Carolina Solar Business Alliance, LLC, ...Appellants,

v.

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, South Carolina Public Service Commission, South Carolina Electric & Gas Company, CMC Steel South Carolina, South Carolina Energy Users Committee, Southern Current, LLC, and South Carolina Office of Regulatory Staff,

Of whom, South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff are .....Respondents.

PROOF OF SERVICE

This is to certify that I, Laura Lee Andrews, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondent South Carolina Electric & Gas Company's **Initial Brief of Respondent** and **Designation of Matter to be Included in the Record on Appeal** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Chief Clerk/Administrator
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Laura Lee Andrews

Columbia, South Carolina
This 3rd day of April, 2019.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Public Service Commission Docket No. 2018-2-E

South Carolina Coastal Conservation League and
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Of whom, South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff are ..... Respondents.

RESPONDENT SOUTH CAROLINA ELECTRIC & GAS COMPANY'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent South Carolina Electric & Gas Company propose the following be included in the Record on Appeal, in addition to those matters designated by Appellants South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, and the South Carolina Solar Business Alliance, LLC:

1. Petition for Rehearing or Reconsideration filed by the South Carolina Energy Users Committee on May 10, 2018.

The undersigned certifies that this designation contains no matter which is irrelevant to this appeal.

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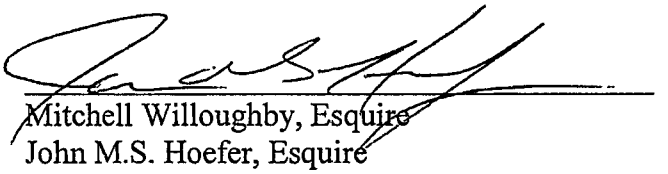

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April 3, 2019

THE STATE OF SOUTH CAROLINA
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Of whom, South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff are ..... Respondents.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA ELECTRIC & GAS COMPANY

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STATEMENT OF ISSUES ON APPEAL

1. Did the Public Service Commission of South Carolina ("PSC") correctly determine that Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, the "Conservation Groups") and Appellant South Carolina Solar Business Alliance ("Solar Alliance") had a burden of persuasion to demonstrate the avoided costs they proposed for South Carolina Electric & Gas Company ("SCE&G") were just, reasonable, and appropriate?

2. Should this Court affirm the PSC's decision on the basis that the record contains substantial evidence supporting the finding that SCE&G satisfied its burden to demonstrate its recommended avoided costs were reasonable and that the other parties did not satisfy their burdens with respect to their proposed alternatives?

3. Should this Court affirm the PSC's decision on the additional sustaining ground that the other parties failed to present a tenable basis to raise the specter of imprudence and that SCE&G substantiated its proposed avoided costs?

4. Should this Court affirm the PSC's decision on the basis that it complies with all statutory, regulatory, and legal requirements and is supported by substantial evidence of record?

5. Because the Conservation Groups and the Solar Alliance failed to include in their Notices of Appeal the PSC's orders regarding discovery and the procedural schedule, should this Court hold that these issues are not preserved for appellate review?

6. Because the Conservation Groups and Solar Alliance did not sufficiently identify in their Petitions for Rehearing or Reconsideration any portions of the PSC's decision that were insufficient to provide a basis for its findings of fact, should this Court hold that this issue is not preserved for appellate review?

STATEMENT OF THE CASE

This is an appeal from orders issued by the PSC in a contested case proceeding involving an annual review of the fuel purchasing practices and policies of SCE&G. *See* S.C. Code Ann. § 58-27-865 (2015). The PSC was required to consider the need to adjust the factors involved in SCE&G's recovery of the costs of fuel related to the generation and sale of electricity, including any costs associated with purchasing power from non-utility power producers pursuant to the Public Utility Regulatory Policies Act, 16 U.S.C.A. §§ 796, *et seq.* ("PURPA"). *See* S.C. Code Ann. § 58-27-865 (2015). The PSC also was required to determine whether to adjust the fuel cost component designed to recover incremental and avoided costs incurred for implementing a Distributed Energy Resource ("DER") program. *See* S.C. Code Ann. § 58-39-140 (2015). Timely petitions to intervene were filed by the Conservation Groups, the Solar Alliance, the South Carolina Energy Users Committee ("Energy Users"), Southern Current, LLC, and CMC Steel South Carolina. The South Carolina Office of Regulatory Staff ("ORS") also was a party of record. *See* S.C. Code Ann. § 58-4-10(B) (2015).

The PSC conducted a full evidentiary hearing on April 10-11, 2018, and issued its order on May 2, 2018. [Order No. 2018-322(A); R. ___.] On May 10, 2018, the Conservation Groups, the Solar Alliance, and Energy Users filed petitions for rehearing or reconsideration of Order No. 2018-322(A). [Conservation Groups Pet. for Reh'g or Recons., R.___; Solar Alliance Pet. for Reh'g and/or Recons., R.___; Energy Users Pet. for Reh'g or Recons., R.___.] On May 11, 2018, ORS also filed a petition for rehearing or reconsideration of Order No. 2018-322(A). [ORS Pet. for Reh'g or Recons., R. __.]

On the motion of Commissioner Robert T. Bockman, on May 23, 2018, the PSC granted the Energy Users petition[1] and denied the other petitions for reconsideration, but did not issue a final order at that time. [PSC May 23, 2018, Directive, R.___.] The Conservation Groups then filed a Notice of Appeal but, because the PSC had not then issued a final order on the petitions for rehearing or reconsideration, this Court held the appeal in abeyance pending the PSC's final order. [Conservation Groups June 21, 2018, Notice of Appeal; S. Ct. Order dated August 16, 2018].

On October 30, 2018, the PSC issued its final order on the petitions for rehearing or reconsideration. [Order No. 2018-708, R. ___.] On November 28, 2018, the Conservation Groups filed an Amended Notice of Appeal in Appellate Case No. 2018-1165 seeking review of Order No. 2018-322(A), the PSC's May 23, 2018, Directive, and Order No. 2018-708. [Conservation Groups Am. Notice of Appeal.] On November 28, 2018, the Solar Alliance also filed a Notice of Appeal in Appellate Case No. 2018-2117 seeking appellate review of Order No. 2018-322(A), the PSC's May 23, 2018, Directive, and Order No. 2018-708. [Solar Alliance Notice of Appeal.] ORS and the remaining parties did not appeal the PSC's decisions. On January 31, 2019, the Court granted SCE&G's motion to consolidate the Conservation Groups' and the Solar Alliance's appeals pursuant to Rule 214, SCACR. [S. Ct. Order dated January 31, 2019.][2]

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[1] Although SCE&G agreed to provide Energy Users with monthly fuel recovery reports and quarterly fuel forecasts, there was no reference to this agreement in Order No. 2018-322(A). Energy Users petitioned the PSC to reconsider this matter and include these terms into the order, which was granted without objection from any party. [Order No. 2018-708 p. 2; R.___.]

[2] The instant Respondent's Brief is addressed to both of the briefs filed by the Conservation Groups and the Solar Alliance.

STATEMENT OF FACTS

Congress enacted PURPA in 1978 as part of a national energy initiative. Pertinent here, PURPA requires electric utilities like SCE&G to offer to purchase electric energy made available by certain nonutility power producers known as "qualifying small power production facilities" and "qualifying cogeneration facilities" (collectively, "Qualifying Facilities"). 16 U.S.C.A. §§ 796(17)(C) and (18)(D); 824a-3 (a) and (b). Congress also directed the Federal Energy Regulatory Commission ("FERC") to issue rules and regulations requiring electric utilities to buy electric energy from Qualifying Facilities and each state's regulatory authority, including the PSC, to implement FERC's rules. 16 U.S.C.A. §§ 824a-3(a) and (f); *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 751 (1982).

Under FERC regulations, the rate a Qualifying Facility receives for power sales generally is identified as the "avoided cost" rate, which is "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [Qualifying Facility], such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6). Avoided costs include two components: "energy" and "capacity." "Energy costs are the variable costs associated with the production of electric energy ... [and] represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities." *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980) ("Order No. 69"). PURPA also specifically provides that avoided costs cannot "exceed[] the incremental cost to the electric utility of alternative electric energy." 16 U.S.C.A. § 824a-3(b).

Avoided costs are "intended to leave ratepayers economically indifferent to the source of a utility's energy by ensuring that the cost to the utility of purchasing power from a [Qualifying Facility] does not exceed the cost the utility would incur in the absence of the [Qualifying Facility] purchase." *Pub. Serv. Co. of Oklahoma v. State ex rel. Oklahoma Corp. Comm'n*, 115 P.3d 861, 870–71 (Okla. 2005); *see also* tr. Vol. 2, p. 661, ll. 3-14, R.___. Thus, the avoided cost rate paid to a Qualifying Facility should equal and not exceed a utility's cost to either 1) generate the power it needs to serve customers, or 2) purchase that power from another source. If avoided costs exceed the utility's cost of generating power or purchasing it elsewhere, ratepayers are not indifferent because they have to pay higher rates to obtain power from Qualifying Facilities.

In South Carolina, the PSC determines an electric utility's avoided energy and capacity costs as part of its annual fuel cost review. *See* S.C. Code Ann. § 58-27-865(B) (2015). The PSC approves for inclusion in an electric utility's "base rate an amount designed to recover, during the succeeding twelve months, the fuel costs determined by the PSC to be appropriate for that period, adjusted for the over-recovery or under-recovery from the preceding twelve-month period." *Id.* These fuel costs include several cost categories including "the cost of fuel, cost of fuel transportation, and fuel costs related to purchased power." S.C. Code Ann. § 58-27-865(A)(1) (2015).[3] "Fuel costs" also specifically include the Company's "avoided costs under [PURPA]." S.C. Code Ann. § 58-27-865(A)(2)(c) (2015). Accordingly, SCE&G recovers, through its approved fuel costs, the reasonable and prudent costs incurred to generate or purchase power used to provide electric service to its customers, including avoided costs paid to Qualifying Facilities under PURPA.

[3] Neither the Conservation Groups nor the Solar Alliance challenges the PSC's findings with respect to SCE&G's non-PURPA related fuel costs.

SCE&G's approved avoided costs are reflected in two separate tariffs, which are identified as "Rate PR-1" and "Rate PR-2," and which are incorporated into power purchase agreements with Qualifying Facilities seeking to sell power to SCE&G pursuant to PURPA.[4] [Tr. Vol. 2, p. 574, l. 22 – p. 575, l. 3, R.___.] SCE&G updates Rate PR-1 and Rate PR-2 each year using a difference in revenue requirements methodology that has previously been approved by the PSC and is consistent with PURPA requirements.[5] This methodology calculates the revenue requirements for avoided energy and capacity costs using a "base case" (defined by SCE&G's existing fleet of generators and hourly load profile) and a "change case" (which is the same as the base case except that hourly loads are reduced by a 100 MW profile—the maximum reduction required by PURPA regulations for utilities with systems larger than 1,000 MW of generation such as SCE&G).[6] [Tr. Vol. 1, p. 198, l. 15 – p. 199, l. 2, R. ___.] *See* 18 C.F.R. § 292.302(b)(1).

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[4] Rate PR-1 is for smaller Qualifying Facilities that have power production capacity of less than or equal to 100 kilowatts ("kW") and sets forth SCE&G's avoided costs for a prospective 12-month period. [Tr. Vol. 1, p. 159, ll. 5-9, R.___; Order No. 2018-322(A) p. 5, R.___.] Rate PR-2 is for power purchased from larger Qualifying Facilities with production capacity of greater than 100 kW and less than or equal to 80 megawatts ("MW") and establishes SCE&G's avoided costs for a prospective 15-year period, which is consistent with SCE&G's Integrated Resource Plan planning horizon. [Tr. Vol. 1, p. 159, ll. 16-20, R. ___.] *See* S.C. Code Ann. § 58-37-10 (2015).

[5] The difference in revenue requirements methodology follows directly from PURPA's definition of avoided costs in that it involves calculating the cost SCE&G would incur to generate or supply the next increment of electric energy and capacity using its own resources. [Tr. Vol. 1, p. 198, ll. 15-17; R. ___.] *See* 16 U.S.C.A. §§ 824a-3(b) (avoided costs shall not "exceed[] the incremental cost to the electric utility of alternative electric energy,"), 824a-3(d) (defining "incremental cost of alternative electric energy" to mean "the cost to the electric utility of the electric energy which, but for the purchase from [the Qualifying Facility], such utility would generate or purchase from another source."). *See also* Order No. 69, 45 Fed. Reg. at 12,216.

[6] SCE&G's incremental avoided energy costs reflect the difference in SCE&G's cost to generate an equivalent amount of energy under the "base" plan and the "change" plan. [Tr. Vol. 1, p. 199, ll. 8-9, R. ___.] For incremental avoided capacity costs, SCE&G calculates a "base case" resource plan reflecting the amount of revenue required for the additional capital investment necessary to support its Integrated Resource Plan. [Tr. Vol. 1, p. 208, ll. 1-4, R. ___.] *See* S.C. Code Ann. §§ 58-37-10(2), -40 (2015). SCE&G then calculates a "change case" resource plan reflecting the amount of revenue required assuming 100 MW of additional Qualifying Facility generation is added to its system. The difference between the two plans reflects SCE&G's incremental capacity costs. [Tr. Vol. 1, p. 208, ll. 3-5, R. ___.]

At the time of the proceedings below, SCE&G had experienced substantial growth in the number and output of solar facilities which can be interconnected with its system. Solar generating facilities with 875 MW[7] in generating capacity, equivalent to 17% of SCE&G's 2018 forecasted system peak demand, had signed power purchase agreements with SCE&G prior to the hearing on the merits held in this matter. [Tr. Vol. 1, p. 231, ll. 19-21, R. ___; tr. Vol. 1, p. 285, ll. 10-13, R.___.] These power purchase agreements compensate the existing solar generating facilities based upon SCE&G's avoided costs in effect at the time the power purchase agreements were executed, which included an amount for avoided capacity. [Tr. Vol. 1, p. 184, ll. 7-12, R.___; tr. Vol. 1, p. 231, ll. 19-21, R.___; tr. Vol. 1, p. 285, ll. 10-13, R.___; tr. Vol. 1, p. 458, ll. 5-11, R.___; tr. Vol. 1, p. 459, ll. 6-8, R.___.] The issue presented to the PSC therefore concerned what costs of energy and capacity SCE&G could avoid by adding another 100 MW of solar Qualifying Facility generation (incremental to the existing 875 MW of solar generation). [Tr. Vol. 1, p. 285, ll. 10-16, R.___, tr. Vol. 1, p. 458, ll. 5-11.]

In developing its avoided energy and capacity cost estimates, SCE&G determined that abnormal weather can cause significant deviations in its peak demands more in winter than summer. [Hr'g Ex. 5, JML-2 at 6, R.___.] As a result, SCE&G concluded that it required base reserves equal to 21% of its winter peak load during winter peak load periods and 14% of summer peak load during summer peak load periods. [Tr. Vol. 1, p. 200, ll. 9-15, R.___.] Because it needs more reserve capacity during winter, SCE&G concluded that a generating resource must be able to provide capacity in both winter and summer in order for the generating

[7] On February 23, 2018, when it pre-filed the direct testimony of its witnesses with the PSC, SCE&G had 700 MW of solar capacity available under existing power purchase agreements. [Tr. Vol. 1, p. 208, ll. 9-11; R. ___.] When it pre-filed rebuttal testimony on March 29, 2018, the amount of solar capacity under contract had increased to 865 MW. [Tr. Vol. 1, p. 231, ll. 18-19; R. ___.] By the time of the hearing, that amount had increased to 875 MW. [Tr. Vol. 1, p. 285, ll. 10-13. R. ___.]

resource to have capacity value. [Tr. Vol. 1, p. 209, ll. 9-12, R.___.] SCE&G also determined that its winter system load peaks either early in the morning before solar begins to generate energy or in the evening after solar is no longer generating. SCE&G therefore concluded that, on most winter days, an additional 100 MW of solar generation will not help meet daily peak demands. [Tr. Vol. 1, p. 208, l. 22 – p. 209, l. 8, R.___.] Because this incremental solar generation provides no capacity benefits during the winter, the addition of 100 MW in solar Qualifying Facility generation would not allow SCE&G to avoid any projected future capacity needs. SCE&G therefore concluded that the avoided capacity cost of incremental solar generation is zero. [Tr. Vol. 1, p. 210, l. 2, R.___.]

The Conservation Groups did not introduce any probative evidence regarding the winter reserve margin. Instead, they merely complained that SCE&G's winter reserve margin was higher than those of other utilities and recommended that SCE&G should maintain its previous winter reserve margin of 14%. [Tr. Vol. 1, p. 389, ll. 11-14, R.___; tr. Vol. 1, p. 390, l. 17 – p. 391, l. 25, R.___.] The Conservation Groups also did not offer any probative evidence of avoided capacity costs but only requested that the PSC require SCE&G to recalculate avoided capacity costs based on a lower winter reserve margin. [Tr. Vol. 1, p. 395, ll. 7-22, R.___.]

SCE&G presented evidence demonstrating ORS's proposed winter reserve margin of 18.4% was subject to various errors. [Tr. Vol. 1, p. 236, l.1 – p. 244, l. 6, R.___.] Even so, ORS's proposal supported SCE&G's determination that its winter capacity needs were greater than its summer capacity needs. [Tr. Vol. 1, p. 234, ll. 2-4, R. ___.] ORS also did not provide an independent estimate of SCE&G's avoided capacity costs, but instead suggested that the PSC require SCE&G either to provide an estimate and calculation of avoided capacity costs using

different assumptions, or to maintain the current avoided capacity cost value. [Tr. Vol. 2, p. 591, ll. 20-23, R.___; tr. p. 592, ll. 5-11, R. ___.]

Although the Solar Alliance, which represents solar energy-related businesses in South Carolina, *see* Solar Alliance Pet. to Intervene at p. 2, R.___, offered an estimate of SCE&G's avoided capacity costs, it did not use the PSC-approved difference in revenue requirements methodology. Instead, the Solar Alliance (whose members would directly benefit from the approval of higher avoided costs for any future solar Qualifying Facilities they may construct) developed estimates of SCE&G's avoided costs based on the cost to construct nuclear or gas-fired generating facilities, but did not take into account the substantial solar generation that had been added to SCE&G's system. This resulted in significantly higher avoided capacity costs than those previously approved by the PSC in 2017. [Tr. Vol. 2, p. 684, l. 16 – p. 685, l. 4, R.___; tr. Vol. 2, p. 768, ll. 13-16, R. ___; tr. Vol. 2, p. 775, ll. 11-12, R.___.]

In reviewing and evaluating this evidence of record, the PSC concluded that SCE&G's proposal to set avoided capacity costs at zero was reasonable. [Order No. 2018-322(A) p. 15, R. ___.] Among other things, the PSC recognized that, under the existing power purchase agreements, SCE&G will be required to purchase a substantial amount of energy—875 MW—generated by solar Qualifying Facilities. [Order No. 2018-322(A) p. 15, R.___.] The PSC also found SCE&G requires a 21% reserve margin in the winter to reliably serve its customers. [Order No. 2018-322(A), p. 15, R. ___.] The PSC further agreed that a generating resource has to provide SCE&G with capacity in the winter as well as in the summer in order to have capacity value. [Order No. 2018-322(A), p. 15, R. ___.] The PSC also found that adding another 100 MW of solar generation has no effect on SCE&G's resource plan and does not affect its future capacity needs. [Order No. 2018-322(A), p. 15, R. ___.]. The PSC therefore concluded that,

because additional solar generation does not provide capacity during the winter, SCE&G cannot avoid any projected future capacity needs with additional solar generation. [Order No. 2018-322(A), pp.15-16, R. ___.] Regarding the alternatives advanced by the Conservation Groups, ORS, and the Solar Alliance, the PSC found these alternatives were "mere assertions that fail to offer and justify an alternative just and reasonable rate" and were "of limited value in the final determination of a just, reasonable, and appropriate rate." [Order No. 2018-322(A) p. 16, R.___.]

STANDARD OF REVIEW

In reviewing PSC orders, this Court may not substitute its judgment for that of the PSC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380 (Supp.2018). "The [PSC] is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 179, 341 S.E.2d 126, 128-29 (1986). PSC orders also have the force and effect of law and are presumptively valid, reasonable, and correct. *Chemical Leaman Tank Lines, Inc. v. S.C. Pub. Serv. Comm'n*, 258 S.C. 518, 521, 189 S.E.2d 296, 297 (1972). Consequently, "[t]his Court applies a deferential standard in reviewing decisions by the PSC" and "will not substitute [its] judgment for that of the PSC where there is room for a difference of intelligent opinion." *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004).

"Because the PSC's findings are presumptively correct, the party challenging a PSC order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001); *see also* S.C. Code Ann. § 1-23-380(5) (Supp.2018); S.C. Code Ann. § 58-27-2340 (2015).

Accordingly, the Court must affirm a PSC decision unless it is arbitrary, i.e., "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rule or standards." *Converse Power Corp. v. S.C Dep't of Health & Envtl.* Control, 350 S.C. 39, 47, 564 S.E.2d 341, 345 (2002).

The factual findings of an administrative agency, such as the PSC, also are presumed correct and will be set aside only if unsupported by substantial evidence. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 603, 550 S.E.2d 287, 292 (2001). "The fact that this Court may have reached a different decision is irrelevant" if "[t]he record contains substantial evidence which supports the agency's decision...." *Rampey by Gossett v. State Health & Human Servs. Fin. Comm'n*, 292 S.C. 129, 132, 355 S.E.2d 268, 270 (1987). Under the substantial evidence rule, a reviewing court will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Id.*, 345 S.C. at 603-04, 550 S.E.2d at 292 (*quoting Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) (citations omitted). Substantial evidence is not "evidence viewed blindly from one side, but ... evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Welch Moving & Storage Co. v. Pub. Serv. Comm'n of S.C.*, 301 S.C. 259, 261, 391 S.E.2d 556, 557 (1990). Even "[w]here reasonable minds might differ," "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Cent. Transp., Inc. v. S.C. Pub. Serv. Comm'n*, 289 S.C. 267, 270, 346 S.E.2d 25, 27 (1986).

SUMMARY OF ARGUMENT

For a variety of reasons, the Conservation Groups and the Solar Alliance have failed to meet their burden to show that the PSC's findings are unsupported by substantial evidence or are erroneous as a matter of law. The PSC correctly recognized that, as the proponents of alternative avoided costs that would increase SCE&G's costs (to be recovered in customer rates) to purchase electricity generated by future Qualifying Facilities, the Conservation Groups and the Solar Alliance had the burden of persuasion to show that their proposals would result in avoided costs that were just, reasonable, and appropriate. The record reflects that they did not meet this burden, instead offering only speculative and unreliable testimony that the PSC properly concluded was insufficient to support their proposals. And even if the Conservation Groups and the Solar Alliance did not bear a burden of persuasion, they failed to meet their burden to produce evidence of a tenable basis to raise the specter of imprudence regarding SCE&G's proposed avoided costs. Moreover, SCE&G substantiated its proposed avoided costs to overcome any such specter of imprudence.

In contrast, the record contains substantial evidence to support the PSC's determination that SCE&G's proposed avoided costs were just, reasonable, and appropriate; reflected changes in circumstances resulting from significant increases in interconnected solar generation; and complied with all statutory, regulatory, and legal requirements. The Conservation Groups and the Solar Alliance also improperly attempt to raise issues that have not been preserved for appellate review. The PSC's decision to approve SCE&G's proposed avoided costs should be affirmed.

ARGUMENT

I. THE PSC CORRECTLY DETERMINED THAT THE CONSERVATION GROUPS AND THE SOLAR ALLIANCE HAD A BURDEN OF PERSUASION TO DEMONSTRATE THAT THEIR PROPOSED AVOIDED COSTS WERE JUST, REASONABLE, AND APPROPRIATE.

Contrary to the arguments of the Conservation Groups and the Solar Alliance, each party had the burden to persuade the PSC that their proposed avoided costs were just, reasonable, and appropriate. The PSC correctly found that the Conservation Groups, the Solar Alliance, and other parties offering alternative proposals to SCE&G's recommendations failed to satisfy their burdens. The PSC decision therefore should be affirmed.

A. The presumption of reasonableness recognized in *Hamm* applies only to previously incurred expenses and not to prospective estimates of a utility's avoided costs.

In their arguments about the burdens of proof, the Conservation Groups and the Solar Alliance fundamentally misread this Court's decision in *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) ("*Hamm*"). Under *Hamm*, utilities enjoy an initial presumption their expenses[8] are reasonable and incurred in good faith, but "once an intervening party ... demonstrates a 'tenable basis for raising the specter of imprudence,' there is no longer a presumption of reasonableness and the utility then bears the burden to 'further substantiate its claim[s]." [Conservation Groups Init. Br. p. 11 (quoting *Hamm*); Solar Alliance Init. Br. p. 17 (quoting *Hamm*).] *See also Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110, 708 S.E.2d 755, 763 (2011) ("*USSC*") ("Thus, if an investigation initiated by ORS

[8] The Conservation Groups state that *Hamm* stands for the proposition that "[u]tilities enjoy an initial presumption that their **rates** and expenses are 'reasonable and incurred in good faith.'" Conservation Groups Init. Br. p. 11 (*quoting Hamm*, 309 S.C. at 286, 422 S.E.2d at 112) (emphasis added). The Solar Alliance also cites *Hamm* in support of its contention that "[w]hen the [PSC] considers a utility's proposed **rates**, they are entitled to an initial presumption of reasonableness." Solar Alliance Init. Br. p. 17 (emphasis added). For the reasons discussed *infra*, the presumption addressed in *Hamm* applies only to **expenses**, not **rates**.

or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures.") (emphasis in original). Although *Hamm*'s presumption of reasonableness does not shift the burden of persuasion, it does shift the burden of production to other parties "to demonstrate a tenable basis for raising the specter of imprudence" that these expenses were unreasonable.[9] *Hamm,* 309 S.C. at 286, 422 S.E.2d at 112.

In misinterpreting *Hamm*, the Conservation Groups and the Solar Alliance suggest that "the 'burden of persuasion' always rests with the utility," Conservation Groups Init. Br. p. 12., and that it therefore was "improper for the [PSC] to impose a burden of persuasion on intervenors to put forth a 'fully viable' alternative," Solar Alliance Init. Br. p. 18, for SCE&G's avoided costs. Instead, they argue that, under *Hamm*, they only had to produce evidence that "raised the specter of imprudence" with respect to SCE&G's proposed avoided costs to satisfy their burden of production. [Conservation Groups Init. Br. p. 14, Solar Alliance Init. Br. p. 18.][10]

However, *Hamm* does not apply to the PSC's determination of prospective avoided costs. Avoided costs do not reflect any prior "expenses" that SCE&G previously incurred and is seeking to recover through increased rates, such as those that were at issue in *Hamm*.[11] Rather,

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[9] This presumption arises out of the recognized principle that the PSC "is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard...." *State of Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri*, 262 U.S. 276, 289 (1923) (cited with approval in *Hamm*, 309 S.C. at 286, 422 S.E.2d at 112).

[10] The Conservation Groups also wrongly state that, "[i]n *Hamm*, this Court ruled that SCE&G's proposal to earn a 13.25% rate of return on common equity was too high based on testimony from multiple experts in the proceeding." Conservation Groups Init. Br. p. 15. In reality, this Court reversed the PSC because it found that SCE&G sought a return on common equity that was **beyond** the ranges that could be supported by the evidence of record. *Hamm*, 309 S.C. at 288, 422 S.E.2d at 113-114.

[11] The Conservation Groups argue the presumption recognized in *Hamm* and *USSC* applies to fuel cost proceedings because *Hamm* contains a "citation to a 1987 fuel cost case." [Conservation Groups Init. Br. p. 12 (but stating both *Hamm* and *USSC* were "general rate case proceedings")]. Although they fail to identify the "1987 fuel cost case," they appear to reference *Hamm v. S.C. Pub. Serv. Comm'n*, 291 S.C. 119, 352 S.E.2d 476 (1987) ("*Hamm 1987*"). While that matter arose out of a fuel cost proceeding, the pertinent issue was whether the utility should be allowed to recover fuel costs incurred as a result of a nuclear generating unit shutdown. *Id.*, 291 S.C. at

these avoided costs represent the amount future Qualifying Facilities will be paid for the electric energy and capacity they may supply and are based on reasonable and appropriate estimates of the incremental energy and capacity costs SCE&G will avoid in the future if it is required to make the purchases.[12] *See* 18 C.F.R. § 292.101(b)(6); Order No. 2018-322(A), p. 46, R.___; Order No. 69, 45 Fed. Reg. at 12,226 (recognizing "that the translation of the principle of avoided capacity costs from theory into practice is an extremely difficult exercise, and is one which is based on estimation and forecasting of future occurrences."). This proceeding therefore is as much (if not more) about what future third-party suppliers of electricity will be paid as it is about what costs SCE&G and its customers will avoid in the future.

Accordingly, each party that proposed a methodology to calculate SCE&G's avoided cost, including the Conservation Groups and the Solar Alliance, had the burden to persuade the PSC that their proposal was just, reasonable, and appropriate.[13] SCE&G's proposed avoided

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121, 352, S.E.2d at 477. This Court agreed with the Consumer Advocate that the increase in fuel costs resulted from utility mismanagement and the excess should be disallowed *Id.*, 291 S.C. at 123, 352, S.E.2d at 478. Accordingly, *Hamm 1987* addressed expenditures that had been *previously incurred* by a utility, not *prospective estimates* of avoided costs, such as those at issue in SCE&G's 2018 annual fuel cost proceeding. *See also Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 542, 426 S.E.2d 319, 321 (1992) (stating that in *Hamm* this Court "held that when higher fuel costs *are incurred*, and there is a finding of imprudence, the utility should not be allowed to pass on the additional fuel costs to their customers.") (emphasis added). In addition, electric utility fuel cost proceedings did not involve a determination of avoided costs under PURPA at that time.

[12] For these same reasons, the Conservation Groups' and the Solar Alliance's citations to S.C. Code Ann. §§ 58-27-810 and -865 (f) are erroneous. Section 58-27-810 provides that "[e]very rate made, **demanded or received** by any electrical utility ... shall be just and reasonable." (Emphasis added). Avoided costs do not pertain to rates "demanded or received" by SCE&G, but reflect the amounts **to be paid** by SCE&G to Qualifying Facilities. Similarly, the Conservation Groups are not aided by Section 58-27-865(f), which provides the PSC "shall disallow recovery of fuel costs" that result from the "failure of the utility to make every reasonable effort to minimize fuel costs or any decision of the utility resulting in unreasonable fuel costs" and that "minimization of the total cost of providing service" is desirable. Here, the Conservation Groups and the Solar Alliance do not want to **minimize** costs; they want SCE&G to pay Qualifying Facilities **more** which would **increase** fuel costs. While avoided costs must be just, reasonable, and appropriate, that does not place a burden on SCE&G to prove that its avoided costs are not unreasonably or impermissibly lower than what is required by PURPA.

[13] The Conservation Groups' claim that "the regulatory compact places the burden to justify rates with the utility," Conservation Groups Init. Br. p. 12, is also false. SCE&G does not "directly benefit from cost recovery enabled by Commission approval of proposed rates," as the Conservation Groups suggest. [*Id.*] Instead, PURPA requires SCE&G to purchase electricity from Qualifying Facilities instead of generating an equal amount of electricity using its own facilities to serve customers. SCE&G then recovers these payments to Qualifying Facilities,

costs were not blanketed with the presumption of reasonableness contemplated by *Hamm* and the Conservation Groups and the Solar Alliance can point to nothing in the PSC Orders concluding SCE&G was entitled to, or received, a presumption of reasonableness.[14] Instead, SCE&G had the burden to persuade the PSC that its proposal for the appropriate amounts to pay new Qualifying Facilities for the energy and capacity they may provide in the future was just, reasonable, and appropriate. Similarly, the Conservation Groups, the Solar Alliance, and other parties did not merely have "to demonstrate a tenable basis for raising the specter of imprudence" as they suggest is required by *Hamm* because there were no expenses presumed to be reasonable and, thus, no "specter of imprudence" to raise. Because they were advocating for increased avoided energy and capacity costs to be paid by SCE&G to future Qualifying Facilities, and as discussed further below, these parties had their own burden to persuade the PSC that the higher avoided costs for which they advocated were just, reasonable, and appropriate.

B. Each party that proposed an estimate of avoided costs bore a burden of persuasion to demonstrate its recommendation was just, reasonable, and appropriate.

Simply because SCE&G is an electrical utility whose fuel costs were at issue below does not mean that it was the only party with the burden of proof. Instead, because SCE&G, the Conservation Groups, the Solar Alliance, and ORS each recommended a different methodology to estimate SCE&G's incremental avoided costs, they also each bore a burden of persuasion to demonstrate by a preponderance of the evidence that their recommendations would result in avoided costs that were just, and reasonable and appropriate. *See DIRECTV, Inc. & Subsidiaries*

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without markup, from customers through the fuel cost factor. Because there are no "rates" to justify, the regulatory compact is inapplicable.

[14] In fact, the only mention of any presumption was the PSC's statement that the Solar Alliance contended "using the approved avoided capacity factor from the most recent fuel case should enjoy a presumption of reasonableness." [Order No. 2018-708 p. 4, R.___.].

v. S.C. Dep't of Revenue, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct.App.2017) ("In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof"); *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132–33, 530 S.E.2d 643, 651 (Ct.App.2000) *citing and quoting* 2 Am.Jur.2d Administrative Law § 360 (1994) ("Generally the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding").

A similar issue was presented in *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79, 767 S.E.2d 195 (2014) ("*Carmax*"), which involved a corporate taxpayer seeking to use a statutory apportionment method to determine its state income taxes. The Department of Revenue ("DOR") rejected the use of the proposed statutory apportionment method and proposed an alternative statutory apportionment method to calculate the tax due. The South Carolina Administrative Law Court found that because the taxpayer had requested the contested case hearing to challenge the DOR determination, it bore the burden of proof. *Id.*, 411 S.C. at 87, 767 S.E.2d at 199. On certiorari, this Court held that DOR, because it sought to deviate from a statutory apportionment formula by proposing an alternative statutory formula, bore the burden of proving by a preponderance of the evidence that (1) the statutory formula does not fairly represent the taxpayer's business activity in South Carolina and (2) its alternative accounting method was reasonable. *Id.*, 411 S.C. at 89, 767 S.E.2d at 200; *cf. Aug. Kohn & Co. v. Pub. Serv. Comm'n of S.C.*, 281 S.C. 28, 31, 313 S.E.2d 630, 632 (1984) (affirming a PSC decision where appellant did not disagree with a plant expansion and modification fee but challenged the segregation and allocation of that fee and finding that "the burden is upon the party challenging uniformity and seeking allocation to show that the case so warrants").

For the same reasons presented in *CarMax*, the Conservation Groups, the Solar Alliance, and other parties challenging SCE&G's recommended avoided costs did not just have a burden of production to demonstrate a tenable basis raising the specter of imprudence that SCE&G's proposal was unreasonable or based upon a flawed methodology. Rather, these parties had their own burden of persuasion to show, based upon probative and credible evidence, their proposed methodologies would result in avoided capacity costs that were just, reasonable, and appropriate. *See* Order No. 2018-708, pp. 2-3 ("[T]he other parties do have a burden of persuasion that their proposed alternatives are reasonable and viable if they seek adoption of those alternatives, as they did in this proceeding.").

The PSC therefore did not impermissibly shift the burden of proof from SCE&G, but properly found that the Conservation Groups, the Solar Alliance, and other parties failed to satisfy their burden to persuade the PSC that their alternative proposals would result in avoided costs that were just, reasonable, and appropriate. *See, e.g., S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 221–22, 417 S.E.2d 586, 589 (1992) (holding "the PSC did not impermissibly shift the burden of proof" when it assigned little weight and credibility to expert witness testimony "based not only on [the witness'] failure to develop his own figures, but also on the conjectures and incomplete information which comprised [his] opinions."); *Carmax*, 411 S.C. at 89, 767, S.E.2d at 200; *Aug. Kohn & Co. v. Pub. Serv. Comm'n of S.C.*, 281 S.C. at 31, 313 S.E.2d at 632. Instead, the PSC properly recognized that fuel costs are prospective and must be calculated taking into account updated information and changing conditions. *See* Order No. 2018-708, pp. 4-5, R. ___ (stating that Appellants "would have the PSC extract a single element

(the avoided capacity factor) out of a historical fuel factor and ignore the effects of the passage of time and all attendant changing circumstances").[15]

As discussed further below, there is no substantial evidence of record to support a finding that the proposals advanced by the Conservation Groups, the Solar Alliance, and the other parties would result in just, reasonable, and appropriate avoided costs that would not overcompensate future Qualifying Facilities and thereby cause higher customer rates. Instead, the record reflects that these proposals were highly speculative, based upon outdated information, and merely concepts for deriving an avoided cost factor. There also was no evidence to show that maintaining such avoided costs would be appropriate or that they would not result in SCE&G's customers having to pay for excessive avoided costs. *See* 16 U.S.C.A. § 824a-3(b) (providing that avoided costs "shall be just and reasonable to the electric consumers of the electric utility and in the public interest"). Based on this record, the PSC properly found that SCE&G's proposal was reasonable under the changed circumstances (e.g., addition of 875 MW from solar power purchase agreements), but also found the alternative proposals were insufficient to warrant a requirement that SCE&G pay new Qualifying Facilities for capacity when the energy they supply will not allow SCE&G to avoid any future capacity costs.

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[15] In further explaining this finding, Commissioner Bockman, in moving to approve SCE&G's proposed avoided costs, stated:

> The other parties took great pains to explain how they believe SCE&G inappropriately derived its factor, but the parties failed to present an alternative for us to consider. In these fuel proceedings, it is not legally sound under 58-27-865(A)(2)(c) to assert that, because a party disagrees with the newly proposed factor, then a legacy factor approved in a prior proceeding should be maintained. Moreover, it is not sufficient for a litigating party to meet its burden of proof by asking a utility, after the hearing, to develop a new factor pursuant to that party's specifications for inclusion in rates – an approach several parties would have us do as suggested by proposed orders.

[PSC April 25, 2018, Directive pp. 1-2, R.___ (emphasis in original).]

Accordingly, the PSC correctly concluded the other parties "failed to meet their burden of persuasion to prove the reasonableness and viability of any alternative to SCE&G's proposal" because they did not offer any "probative evidence of a computed factor as opposed to a mere concept for deriving a factor." [Order 2018-708 p. 3, R.___.] The Order should be affirmed.

II. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT SCE&G SATISFIED ITS BURDEN TO DEMONSTRATE ITS PROPOSED AVOIDED COSTS WERE REASONABLE AND THE OTHER PARTIES DID NOT SATISFY THEIR BURDENS WITH RESPECT TO THEIR PROPOSED ALTERNATIVES.

The record reflects that SCE&G presented detailed and credible analyses and information to support its proposals and, therefore, the PSC's decision that SCE&G's proposed avoided energy and capacity costs were just, reasonable, and appropriate is fully supported by substantial evidence. The record also reflects the speculative nature of the avoided costs and underlying methodologies recommended by the Conservation Groups, ORS, and the Solar Alliance. Thus, there is no reliable, probative, or substantial evidence in the record that the other parties' recommendations would yield prospective avoided costs that were just, reasonable, and appropriate. In light of this evidence of record and the other parties' failure to meet their evidentiary burdens, the PSC's decision to reject the alternative proposals and approve the recommendations of SCE&G therefore was not clearly erroneous and must be affirmed. *See Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (holding that "because the [PSC's] findings are presumptively correct, the party challenging a [PSC] order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record").

A. The PSC's decision to approve SCE&G's proposed avoided costs is supported by substantial evidence.

In recent years, SCE&G has experienced a dramatic increase in the amount of solar generation Qualifying Facilities seeking to sell electric power to SCE&G pursuant to PURPA, with 875 MW of solar generation under contract at the time of the hearing. [Tr. Vol. 1, p. 231, ll. 14-21, R.___, tr. Vol. 1, p. 285, l. 11, R.___.] These new sources of non-utility generation allow SCE&G to avoid incurring the cost to generate a portion of its own energy and to construct its own capacity, which otherwise would have been required but for purchases from these Qualifying Facilities. Under the economic principle known as the "Law of Diminishing Marginal Returns," however, the usefulness or value of each successive addition decreases as more and more solar is added to SCE&G. [Tr. Vol. 1, p. 232, ll. 3-5, R.___.] Because solar generation now comprises such a substantial portion of its generating capacity, SCE&G conducted two studies to analyze whether this capacity affects its need for future capacity to reliably serve customers.

Through a "Reserve Margin Study," Joseph M. Lynch, Ph.D., Manager of Resource Planning for SCANA Services, Inc. (an affiliated company of SCE&G), analyzed the amount of reserves SCE&G requires in the summer and in the winter to mitigate the risk of not being able to serve system load requirements. [Hr'g Ex. 5, JML-2 at 2, R. ___.] Based upon a methodology that SCE&G has used for at least 20 years, the Reserve Margin Study separately analyzed SCE&G's reserve capacity needs for the cooling season and the heating season by considering three components of reserve: demand-side risk, supply-side risk, and SCE&G's obligation under a reserve sharing arrangement with other electric utilities that are members of the VACAR (Virginia-Carolinas) reserve sharing group. [Tr. Vol. 1, p. 237, ll. 11-15, R.___.].

SCE&G first looked to the amount of reserves it would need to address demand-side related risk to system reliability, which reflects uncertainty in the level of demand that can

increase primarily as a result of abnormal weather, such as an unusually hot or cold day, or other unforeseen circumstances. [Hr'g Ex. 5, JML-2 at 2-6, R.___.] Dr. Lynch used three years of data to estimate peak demand on SCE&G's system based on the weather that has occurred on historical peak days. [Hr'g Ex. 5, JML-2 at 4, R.___.] The Reserve Margin Study demonstrated that abnormal weather conditions can cause SCE&G's peak demands to deviate from demands under normal weather conditions by as much as 542 MW in the winter but by only 208 MW in the summer. Thus, the study showed that abnormal weather in the winter poses a greater demand-side reliability risk to SCE&G than abnormal weather in the summer. [Hr'g Ex. 5, JML-2 at 6, R. ___.]

The Reserve Margin Study also quantified reliability risks resulting from problems in supplying electricity, which primarily is caused by electric generating facilities that are not available or have reduced capacity, for example, due to mechanical issues, fuel constraints, or abnormal weather. [Hr'g Ex. 5, JML-2 at 2, 6-7, R. ___.] Dr. Lynch reviewed the forced outage history of SCE&G's generating units and developed a distribution of outages for the summer and winter seasons. [Hr'g. Ex. 5, JML-2 at 8, R.___.] To maintain reliability and replace the loss of generating capacity up to 70% of days in the summer and winter seasons, SCE&G determined that it needs approximately 230 MW of reserve capacity in the summer and 224 MW in the winter. [Hr'g. Ex. 5, JML-2 at 7, R.___.] Finally, Dr. Lynch added in the third component of reserves to reflect the approximately 200 MW of operating reserves SCE&G is required to carry to meet its VACAR reserve sharing agreement. [Hr'g. Ex. 5, JML-2 at 2, R.___.]

In total, SCE&G determined it requires 638 MW of operating reserve capacity in the summer and 966 MW in the winter to satisfy reserve requirements. [Hr'g. Ex. 5, JML-2 at 8, R.___.] Dr. Lynch therefore testified that SCE&G needs base load reserves of 21% of the winter

peak loads during the winter peak load periods and 14% of the summer peak loads in summer peak load periods. [Tr. Vol. 1. p. 200, ll. 12-15, R. ___; Hr'g. Ex. 5, JML-2 at 11, R.___.]

SCE&G also analyzed the impact of solar generation on its daily peak demands ("Solar Capacity Benefit Study"). [Tr. Vol. 1, p. 208, ll. 19-22, R.___; Hr'g. Ex. 5, JML-4, R.___.] This study analyzed SCE&G's system load without the addition of solar (the "base case") with the system load that results when solar capacity is added to the system (the "change case"). [Hr'g. Ex. 5, JML-4 at 1-2, R.___.] The Solar Capacity Benefits Study showed that, while adding 800 MW of solar generation can reduce the amount of peak load to be served by SCE&G's generating facilities, adding any additional solar effect would have little to no effect on reducing SCE&G's peak generation needs any further.[16] [Hr'g. Ex. 5, JML-4 at 2, R.___.] As a result, the Solar Capacity Benefits Study demonstrated that adding *another* 100 MW of solar will have the incremental effect of further reducing summer peaks by only about 19.5 MW on peak days and 9.6 MW on the rest of the days and, thus would have little to no effect on SCE&G's residual peak load requirements. [Hr'g. Ex. 5, JML-4 at 2, R.___.]

Similarly, SCE&G analyzed the impact of solar on capacity needs in the winter. The Solar Capacity Benefits Study demonstrated that SCE&G's system typically peaks in winter mornings or evenings when solar facilities are not generating power. For this reason, on more than 80% of the days during the months of October through March, solar generation does not provide any capacity that can reliably be used to meet winter peak demand needs, regardless of how much solar capacity is added to the system. [Hr'g. Ex. 5, JML-4 at 2-6, R.___; tr. Vol. 1, p.

[16] The study showed that adding 800 MW of solar generation to SCE&G's system reduces SCE&G's peak by approximately 525 MW, but also has the effect of shifting SCE&G's residual summer peak to around 8:00 p.m. Because solar facilities cannot generate much, if any electricity at this time of day, adding additional solar beyond 800 MW will have little to no effect on reducing SCE&G's peak any further. Instead, the residual peak must be served by traditional, non-solar generation. [Hr'g. Ex. 5, JML-4 at 2, R.___.].

208, l.17 – p. 210, l. 2, R. ___.] Dr. Lynch therefore testified that incremental solar generation does not assist SCE&G in meeting its winter daily peak demand. [Tr. Vol. 1, p. 208, l. 22 – p. 209, l. 1, R. ___.]

In order to maintain its winter and summer reserve margins, SCE&G projected it would need to add a 540 MW baseload unit in 2023 and a 93 MW peaking/intermediate unit in 2031. [Hr'g Ex. 5, JML-1, R. ___.] Because the Solar Capacity Benefit Study demonstrated that adding another 100 MW of solar generation (incremental to the 875 MW of solar capacity already under contract) would provide no additional capacity benefits during the winter period and only a small amount of capacity benefits in the summer period (19.5 MW on summer peak days and 9.6 MW on the remaining summer days), SCE&G concluded 100 MW of incremental solar capacity would not allow it to reduce or avoid any costs to add planned future capacity. SCE&G therefore estimated that its avoided capacity costs were zero. [Tr. Vol. 1, p. 212, ll. 1-9, R. ___.]

In sum, the record contains more than substantial evidence to support the PSC's finding that "because additional solar does not provide capacity during the winter period, [SCE&G] is unable to avoid any of its projected future capacity needs from additional solar," and, therefore, "SCE&G's proposed avoided capacity costs for solar of zero is reasonable and appropriate." [Order No. 2018-322(A), pp. 15-16; R.___.] This decision is supported by the substantial evidence of record discussed above, which reflects that SCE&G has experienced a dramatic change in circumstances due to solar facilities having contracted to provide 875 MW of solar capacity to SCE&G's system since its last fuel case. [Tr. Vol. 1, p. 208, l. 7-15, R. ___; tr. Vol. 1, p. 231, ll. 14-21, R.___; tr. Vol. 1, p. 285, l.11, R.___; Order No. 2018-322(A) at pp. 8, 15, R.___.] The record also reflects that adding another 100 MW of solar will not enable SCE&G to reduce or avoid any of its future capacity needs. [*Id.*]

Substantial evidence also exists to support the PSC's determination that SCE&G needs as much capacity in the winter as it does in the summer and its recognition that "[a] generation resource has to provide capacity in the winter as well as in the summer in order to avoid the need for capacity and thereby have capacity value." [Order No. 2018-322(A), p. 15, R.___; *see also* tr. Vol. 1, p. 208, l. 17 – p. 212, l. 9, R. ___; Hr'g. Ex. 5, JML-4, R. ___.] On this basis alone, the PSC's decision should be affirmed. *See S.C. Energy Users Comm. v. S.C. Elec. & Gas*, 410 S.C. 348, 353, 764 S.E.2d 913, 915 (2014) ("This Court employs a deferential standard of review when reviewing a decision from the [PSC] and will affirm the [PSC's] decision if it is supported by substantial evidence.") (quoting *S.C. Energy Users Comm. v. Pub. Serv. Comm'n of S.C.*, 388 S.C. 486, 490, 697 S.E.2d 587, 589–90 (2010)).

B. The record is devoid of substantial evidence that the Conservation Groups, the Solar Alliance, and other parties satisfied their burden of persuasion to show the alternative avoided cost proposals were just, reasonable, or appropriate.

The Conservation Groups, the Solar Alliance, and other parties failed to present any probative, reliable, or substantive evidence to show that their proposals would result in avoided costs that were just, reasonable, and appropriate. Instead, their proposals were speculative, based upon stale, historical data, and derived from methodologies previously rejected by the PSC. The record therefore supports the PSC's decision to reject these proposals.

The Conservation Group's proposed methodology recommended recalculating the avoided cost of solar Qualifying Facilities based on a resource plan completed with a reserve margin of 14% as opposed to SCE&G's recommended reserve margin of 21%. [Tr. Vol. 1, p. 388, l. 21 – p. 391, l. 25; R. ___.] However, this recommendation was based solely upon the assertion of its witness, Devi Glick, a consultant with Synapse Energy Economics, Inc., that "SCE&G has historically used a 14[%] winter reserve margin." [Tr. Vol. 1, p. 389, l. 7, R.___.]

Even though she testified "it is very important for the [PSC] to approve only a reasonable, accurate reserve margin," tr. Vol. 1, p. 421, ll. 24-26, R.___, Ms. Glick did not present any analysis that a 14% reserve margin would be appropriate for SCE&G on a going forward basis and did not even recommend that such a reserve margin would be accurate and reasonable. The PSC therefore correctly discounted Ms. Glick's testimony in this regard.[17] *See Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. 195, 205, 51 S.E.2d 744, 749 (1949) ("The existence of a fact or facts cannot rest in speculation, surmise, or conjecture.").

The Conservation Groups took a similar approach for avoided capacity costs. Instead of presenting reliable and credible evidence about SCE&G's incremental avoided capacity costs relative to the addition of another 100 MW of solar generation, the Conservation Groups recommended only that the PSC require SCE&G to recalculate its avoided capacity cost using a 14% reserve margin. [Tr. Vol. 1, p. 395, ll. 14-16, R.___.] Again, the Conservation Groups made no showing whatsoever that calculating avoided capacity costs on this basis would be appropriate going forward, especially in light of the changed circumstances from the prior year.[18]

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[17] In moving to deny the Conservation Groups' and the Solar Alliance's Petitions for Rehearing or Reconsideration, Commissioner Bockman recognized that:

> [i]n this case, [the] Petitioners would have us extract a single element out of a historical fuel factor and ignore the effects of the passage of time and all attendant changing circumstances. Pursuant to South Carolina Code Section 58-27-865(B), the fuel statute's recognition of changing environments and the appropriate and commensurate regulatory response compels us to revisit, reset, and redefine the fuel factors during these annual proceedings. The use of a previously approved factor might be appropriate in the circumstance in which no party had satisfactorily proven its case. That is not the circumstance here.

PSC May 23, 2018, Directive p. 2, R.___.

[18] Commissioner Bockman further noted the problem with requiring the use of "post-hearing compliance filings to fill in the evidentiary gaps after the hearing," stating that:

> it is inappropriate and improper for a party to attempt to use post-hearing compliance filings as a method to force an adverse party to generate the moving party's own proposals. Even if that were done, the proposal of such a factor would be effectively unavailable for cross-examination by the parties or exploration by this Commission.

PSC May 23, 2018, Directive pp. 2-3, R.___.

The Conservation Groups also cite to an alternative avoided capacity cost offered by ORS's witness Brian Horii, a consultant with Energy and Environmental Economics, Inc., but his recommendations suffer from the same deficiencies as those of Ms. Glick. Mr. Horii recommended that SCE&G's capacity value be set at 19.5% of the avoided cost based on SCE&G's solar analysis that found a 100 MW increment of new solar would reduce summer peak demand by about 19.5 MW. [Tr. Vol. 2, p. 591, ll. 15-23, R.___.] However, Mr. Horii did not present any analyses demonstrating the minimal amount of summer capacity supplied by these purchases of incremental solar generation would allow SCE&G to avoid any future capacity needs to reliably serve customers in the winter. In fact, he testified that he was unable to produce an independent estimate of avoided capacity costs for a 100 MW change in supply, but rather merely derived his proposed factor from SCE&G's previous avoided cost rate in 2017. [Tr. Vol. 2, p. 592, ll. 1-12, R.___.]

This concept advanced by Mr. Horii therefore was based upon stale information, as was the proposal advanced by Ms. Glick, and did not reasonably and appropriately represent SCE&G's current avoided capacity costs. Approving such an avoided cost rate for prospective use that is based on circumstances and data from the prior year would have been unreasonable and contrary to prior holdings of this Court.[19] *See Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.*, 324 S.C. 56, 61, 478 S.E.2d 826, 828 (1996) ("*Heater of Seabrook*") (finding it was "inappropriate" for the PSC to rely in a 1997 order on its reasoning in a 1992 order granting an increase to the same company because "this order ... was based on evidence, and a prior test year,

[19] The Conservation Groups cite to the PSC's order at issue in *USSC* in an attempt to equate a denial of general rate relief for a utility with a conclusion by the PSC that the utility must "keep the old rate by default." Conservation Groups Init. Br. at 22. They fail to note that, this Court reversed the PSC's conclusion that the utility in *USSC* failed to meet its burden of proof in view of three errors of law committed by the PSC. *USSC*, 392 S.C. at 107, 708 S.E.2d at 761.

completely different from [the utility's] financial condition at the time of the current application."); Order No. 2018-708, pp. 4-5, R.___ (recognizing the alternative proposals ignore the passage of time and changing circumstances and are inappropriate in light of S.C. Code Ann. § 58-27-865(B)).

The avoided capacity cost estimates presented by the Solar Alliance also lack evidentiary support. Ben Johnson, Ph.D., an economics consultant with Ben Johnson Associates, Inc., provided an estimate of SCE&G's avoided capacity costs based not on the previously-approved difference in revenue requirements method, but on the "Proxy Unit" method involving the cost of a hypothetical nuclear, combined-cycle, and combustion turbine plant. [Tr. Vol. 2, p. 691, ll. 5-12, R.___.] Dr. Johnson's estimates would have resulted in avoided capacity cost payments to Qualifying Facilities, including the members of the Solar Alliance, that were significantly higher than those previously approved by the PSC in 2017, [Tr. Vol. 2, p. 768, ll. 13-16, R. ___; tr. Vol. 2, p. 775, ll. 11-12, R.___] and would have drastically increased the costs borne by SCE&G's customers. More importantly, though, Dr. Johnson did not explain how the cost to construct these proxy plants related to the costs SCE&G would avoid through a Qualifying Facility purchase. [Tr. Vol. 1, p. 267, ll. 1-6, R.___.]. Furthermore, his use of the Proxy Unit method has been specifically rejected by the PSC in prior proceedings. *See* tr. Vol. 1, p. 264, ll. 14-17, R. ___; tr. Vol. 1, p. 266, ll. 16-21, R. ___; tr. Vol. 1, p. 267, ll. 1-6, R. ___.

The Conservation Groups, the Solar Alliance, and other parties therefore failed to provide any substantial evidence that their estimates of SCE&G's avoided capacity costs were reasonable and would properly compensate future solar Qualifying Facilities for the capacity costs SCE&G could avoid as a result of the incremental purchases. The PSC properly rejected these "concepts" as not constituting evidence of a probative factor in determining avoided cost rates. The PSC also

correctly found that "[t]here is no evidence to demonstrate that maintaining such rates would be appropriate or that it would not result in SCE&G's customers having to pay for excessive avoided capacity costs," Order No. 2018-322(A), p. 16, R.___, which would have been contrary to the express language of PURPA regulations. *See* 18 C.F.R. § 292.304(a)(2) ("[n]othing ... requires any electric utility to pay more than the avoided costs for purchases" from Qualifying Facilities). For these reasons, the PSC correctly found that the Conservation Groups, the Solar Alliance, and the other parties failed to meet their burdens of persuasion to demonstrate their recommendations would result in just, reasonable, and appropriate avoided costs.

III. EVEN IF *HAMM* APPLIES, THE OTHER PARTIES FAILED TO SATISFY THEIR BURDEN OF PRODUCTION TO PRESENT A TENABLE BASIS TO RAISE THE SPECTER OF IMPRUDENCE AND SCE&G SUBSTANTIATED ITS PROPOSED AVOIDED COSTS.

Under *Hamm*, the PSC is required to presume that a utility's expenditures are reasonable and incurred in good faith. *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 112. This presumption "does not shift the burden of persuasion but shifts the burden of production onto ... [a] contesting party to demonstrate a tenable basis for raising the specter of imprudence." *Id.*; *see also Smith v. Barr*, 375 S.C. 157, 161, 650 S.E.2d 486, 489 (Ct.App.2007) ("Burden of production refers to a party's responsibility to introduce sufficient evidence on a contested issue to have that issue decided by the fact-finder, rather than decided against the party in a preemptory decision such as directed verdict."). "[T]hat party [then] must present substantial evidence in order to rebut the presumption." *State Acc. Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014); *Daisy Outdoor Advert. Co. v. S.C. Dep't of Transp.*, 352 S.C. 113, 118, 572 S.E.2d 462, 465 (Ct.App.2002) ("Once a party establishes a prima facie case, the burden of proof shifts to the opposing party.").

Even assuming *Hamm* applied, the Order should still be affirmed on the alternative basis that, after SCE&G had made a prima facie case for its proposed avoided cost rates, *see* discussion *supra* Section II.A, the burden of production shifted to the other parties to demonstrate SCE&G's proposed avoided costs were inappropriate. The Conservation Groups, the Solar Alliance, and other parties failed to produce evidence that the PSC found sufficient and credible to satisfy their burden. Moreover, even assuming that a specter of imprudence properly was raised by the other parties, SCE&G substantiated its claims, as required by *Hamm*, to rebut any claims of imprudence advanced. Because the record reflects substantial evidence in this regard, the PSC's decision should be affirmed on this additional sustaining ground.[20]

A. The Conservation Groups and the Solar Alliance improperly seek to have this Court substitute its judgment for the judgment of the PSC as to the weight of the evidence on questions of fact.

There is more than substantial evidence in the record to support the PSC's findings that SCE&G's proposed avoided costs were reasonable. Because the record contains "relevant evidence that, considering the record as a whole, a reasonable mind would accept to support [the PSC's] action," *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998), substantial evidence requires the PSC's decision to be affirmed. *See also Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) ("The substantial evidence rule, prescribed in the statute, means that we will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.") (internal citations omitted); *S.C. Cable Television Ass'n v. S. Bell Tel. &*

[20] *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Dreher v. S.C. Dep't of Health and Envtl. Ctrl.*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[B]ecause an appellate court may affirm the lower court's decision for any reason appearing in the record, the prevailing party may ... raise additional sustaining grounds to support the lower court's decision.").

Tel. Co., 308 S.C. at 219, 417 S.E.2d at 588 (This Court "will not set an order of the PSC aside unless it is found by a convincing showing to be unsupported by evidence or to embody arbitrary or capricious action as a matter of law."). The Conservation Groups and the Solar Alliance present no plausible basis for determining that the PSC's decision is "clearly erroneous." *See* S.C. Code Ann. § 1-23-380(5) (Supp.2018); *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. at 558, 541 S.E.2d at 252. Instead, their arguments amount to nothing more than dissatisfaction that the PSC declined to acquiesce in their view of the issues.

B. The issues raised by the other parties were based upon speculation and did not demonstrate a tenable basis to raise the specter of imprudence.

The Conservation Groups and the Solar Alliance do not view the entirety of the record in attempting to meet their burden to prove the PSC's order "is clearly erroneous in view of the substantial evidence on the whole record." *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct.App.2000). Instead, they opportunistically identify discrete issues and portions of the record taken in isolation to suggest the PSC ignored evidence presented by the parties that allegedly demonstrated SCE&G's proposed avoided cost rates were imprudent. *See* Conservation Groups Init. Br. pp. 13-14; Solar Alliance Init. Br. pp. 21-22. A close review of the record reflects that the Conservation Groups and the Solar Alliance have not identified any evidence that the PSC misapprehended or overlooked or that presented a tenable basis to raise the specter of imprudence. That which they do cite also is based entirely upon speculation, surmise, and conjecture that does not reflect probative and reliable evidence upon which the PSC could have established just, reasonable, and appropriate avoided costs. *See Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. at 205, 51 S.E.2d at 749.

For example, the Conservation Groups cite to the testimony of Ms. Glick for the assertion that if SCE&G had used a 14% reserve margin, the avoided capacity cost would be higher

(resulting in increased payments to new Qualifying Facilities), and, thus, "SCE&G significantly overexaggerated its winter capacity need." Conservation Groups Init. Br. pp. 13-14. But as discussed above in Section II.B, the Conservation Groups did not present any reliable evidence to support their claim that SCE&G's winter reserve margin had not changed from the previous year. Similarly, the Conservation Groups fail to explain how Dr. Johnson's brief and largely unquantified testimony regarding the duration of winter peak demand was sufficient to overcome SCE&G's substantial analysis detailing its winter capacity needs to reliably serve customers. *See* Conservation Groups Init. Br. p. 33. As well, the Conservation Groups failed to show how the minimal capacity (19.5 MW) contributed by incremental Qualifying Facilities in the summer would allow SCE&G to avoid its need to add future generating capacity, thus resulting in a positive avoided capacity cost value. *See* discussion *supra*, Section II.A.

The Conservation Groups also failed to demonstrate that SCE&G "change[d] the way it allocates capacity payments between the summer and winter periods." Conservation Groups Init. Br. p. 13. As discussed more fully in Section IV.A, *infra*, SCE&G did not change the methodology. Rather, applying its existing methodology in view of the fact that it had experienced a dramatic increase in the amount of solar generation under contract, SCE&G demonstrated that adding an additional 100 MW of solar will not allow it to avoid any further capacity. Because SCE&G's proposed avoided capacity costs were zero, there was no allocation to be made between summer and winter, a point that was fully explained and supported in SCE&G's case in chief. *See* discussion *supra*, Section II.A.

The Conservation Groups' criticisms of the use of SCE&G's 2018 Integrated Resource Plan also are unfounded. Although the Conservation Groups claim that SCE&G's proposal was contradicted by the Integrated Resource Plan because it assigns a capacity value to solar

resources for generation planning, they ignore the fact that the cited evidence relates to the 875 MW already under contract. To this point, SCE&G acknowledged in the proceedings below that the 875 MW in solar facilities with signed power purchase agreements provide capacity value, and these Qualifying Facilities are being properly compensated for that value based upon previously approved avoided costs.[21] *See* Statement of Facts *supra*, at pp. 6-7. Again, however, the question in this proceeding was not whether this 875 MW of solar generation provides capacity value, but whether the next increment of 100 MW of solar allows SCE&G to avoid capacity, which it does not. *See* discussion *supra*, Section II.A.

Nor does the Conservation Groups' assertion that the 2018 Integrated Resource Plan "was not finalized" and the Solar Alliance's claim that it "was still being reviewed bear scrutiny.[22] Conservation Groups Init. Br. p. 14; *see also* Solar Alliance Init. Br. p. 22. They suggest an Integrated Resource Plan cannot be used unless and until it is "approved" by the PSC. *See* Conservation Groups Init. Br. p. 14 (citing tr. Vol. I, p. 423, ll. 16-20, R.___.) Integrated Resource Plans filed by electric utilities are not "approved" by the PSC, however. Instead, electric utilities are required only to file these resource planning documents with the PSC every year to reflect their demand and energy forecasts for at least a 15-year period and to set forth a

[21] The Conservation Groups suggest that the evidence presented by SCE&G demonstrating 100 MW of incremental solar would have a minimal impact on its summer peak and no impact on its winter peak somehow conflicts with SCE&G's 2018 Integrated Resource Plan that reflects solar resources have a 35% capacity factor. Conservation Groups Init. Br. p. 25. However, the Integrated Resource Plan addresses the reliable capacity of the 865 MW (now 875 MW) of solar generation that *already* is under contract with SCE&G and will be subject to compensation for avoided capacity based on SCE&G's previously approved avoided costs. *See* Hr'g. Ex. 9 at 40, R.___; tr. Vol. 1, p. 184, ll. 7-12, R.___; tr. Vol. 1, p. 231, ll. 19-21, R.___; tr. Vol. 1, p. 285, ll. 10-13, R.___; tr. p. Vol. 1, 459, ll. 6-8, R.___. Again, the capacity provided by these existing solar providers is unrelated to the question presented in the proceedings below, which addressed the appropriate avoided capacity costs for an *incremental* 100 MW of *future* solar generation.

[22] The Conservation Groups' and Solar Alliance's criticisms that the Integrated Resource Plan overstated peak winter demands and reflected improperly high reserve margins, *see* Conservation Groups Init. Br. p. 14; Solar Alliance Init. Br. p. 22, are unfounded. *See* discussion *supra* Section II. Their claim that the Integrated Resource Plan "is not an 'optimal capacity expansion plan,' as federal law requires," Conservation Groups Init. Br. p. 14, is addressed *infra* in Section IV.D.

program for meeting the forecast in an economic and reliable manner. *See* S.C. Code Ann. §§ 58-37-10, -40 (2015). Because SCE&G uses the resource plan in its latest Integrated Resource Plan to calculate its avoided costs, which methodology has been approved by the PSC, it therefore was appropriate for the PSC to look to the 2018 Integrated Resource Plan forecast to determine whether SCE&G's forecasted capacity needs were appropriate.

The substantial evidence of record therefore reflects that the criticisms of SCE&G's proposed avoided capacity costs did not raise a tenable specter of imprudence. Instead, these claims are based on speculation, general complaints, and the alleged lack of an illusory regulatory approval, none of which are grounded in fact or law. The PSC therefore properly rejected these claims in determining that SCE&G's proposed avoided capacity costs should be approved and those of the other parties should be rejected as mere concepts for deriving a factor that did not present viable alternatives for its consideration. *See* S.C. Code Ann. § 1-23-380(5) (Supp.2018) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

C. Even if the other parties did demonstrate a tenable basis to raise the specter of imprudence, the record contains substantial evidence that SCE&G further substantiated its claims.

Assuming, *arguendo*, the evidence cited by the Conservation Groups and the Solar Alliance did demonstrate a tenable basis to raise the specter of imprudence regarding SCE&G's proposed avoided costs, SCE&G further substantiated its claims and provided additional support to show its proposal was reasonable. *See USSC*, 392 S.C. at 110, 708 S.E.2d at 763.

For example, as to the Conservation Groups' contention that solar Qualifying Facilities should be paid for the capacity they may provide during summer peaking periods, Dr. Lynch testified that "in the context of avoided cost, it is not a question of 'value.'" [Tr. Vol. 1, p. 251, ll.

11-12, R. ___.] Rather, he made clear that "[t]he issue is what costs can be avoided by the purchase of a [Qualifying Facility] resource," explaining that "SCE&G has determined that solar power incremental to the [875] MWs already under signed power purchase agreements does not avoid capacity in its resource plan and therefore has a zero avoided cost." [Tr. Vol. 1, p. 251, ll. 12-15, R.___.] Dr. Lynch further testified that SCE&G had not implemented a change in the methodology; instead, the change "is the significant increase in new solar capacity with signed [power purchase agreements] since the Company's last fuel proceeding and this 'dramatic' change in circumstances is the primary cause of the change in result." [Tr. Vol. 1, p. 231, ll. 15-18, R.___; *see also* tr. Vol. 1, p. 232, ll. 1-16, R.___.] [23]

In response to Mr. Horii's testimony that SCE&G's winter reserve margin should be 18% instead of 21%, Dr. Lynch testified that, even using his proposed number would not change SCE&G's conclusion that avoided capacity costs should be zero because it would demonstrate SCE&G's winter capacity need is greater than that in the summer. [Tr. Vol. 1, p. 233, l. 12 – p. 234, l. 4, R.___.] He also refuted Mr. Horii's suggestion that SCE&G is forecasting winter and summer peak loads in an inconsistent manner, testifying that challenging economic conditions can increase conservation during summer periods, but, "because the winter peak is significantly affected by energy consumed by [electric] heating strips [for supplemental heating],[24] the winter peak will be little affected by conservation." [Tr. Vol. 1, p. 236, ll. 1-17, R. __.] Even so, Dr. Lynch identified an error in Mr. Horii's calculation of the maximum possible winter peak demand and, after correcting for that error, explained that the winter reserve margins estimated

[23] Dr. Lynch further responded to Ms. Glick's testimony that SCE&G's reserve margin was unreasonable when compared to that of other electric utilities. This issue is more fully discussed *infra* in Section IV.C.

[24] In discussing the reasonableness of his estimates, Dr. Lynch explained that heat pumps are very inefficient and do not experience a saturation point like air conditioners do in the summer. [Tr. Vol. 1, p. 238, ll. 1-21, R. ___.]

by SCE&G and ORS would be comparable and not statistically different. [Tr. Vol. 1, p. 240, l. 6 – p. 244, l. 6; R.___.]

Dr. Lynch also responded to the testimony of Dr. Johnson and disagreed that avoided capacity costs should be set equal to the cost of having the utility build and operate its own generating units. In addition to pointing out that the PSC had approved the methodology used by SCE&G as "the proper manner in which to determine the Company's actual avoided cost," he noted that setting avoided costs under any circumstances other than the utility's actual avoided costs would not leave ratepayers indifferent to the Qualifying Facility purchases. [Tr. Vol. 1, p. 264, l. 10 – p. 265, l. 2, R.___.] Dr. Lynch also noted that Dr. Johnson failed to explain how the cost to construct proxy plants relates to the costs SCE&G would avoid through a Qualifying Facility purchase, thereby leaving ratepayers indifferent. [Tr. Vol. 1, p. 266, l. 9 – p. 267, l. 10, R___.] *See Pub. Serv. Co. of Oklahoma v. State ex rel. Oklahoma Corp. Comm'n, supra.*

At bottom, the record reflects that all of the evidence cited by the Conservation Groups and the Solar Alliance in support of their positions amounts only to expressions of their general dissatisfaction with the fact that SCE&G did not use historical and outdated information from previous proceedings and instead presented detailed analyses demonstrating that 100 MW of incremental solar capacity would not allow it to avoid any future generating resources. But the unhappiness of the Conservation Groups and the Solar Alliance is not substantial evidence. They point to no reliable and probative evidence that would support an alternative just, reasonable, and appropriate avoided capacity cost. Instead, the evidence shows these parties only endorsed the continued usage of old data, which would have resulted in higher avoided costs. This is not evidence of a tenable basis raising the specter that SCE&G's proposed avoided costs were imprudent, but merely reflects the Conservation Groups' and the Solar Alliance's lament that the

avoided costs paid to future solar generating facilities will be lower than the avoided costs paid to facilities that previously executed power purchase agreements with SCE&G.[25] While the Conservation Groups and the Solar Alliance are dissatisfied with the result, that does not demonstrate that the avoided costs approved by the PSC (which must "be just and reasonable to the electric consumers of the electric utility and in the public interest" under 16 U.S.C.A. § 824a-3(b)) did not appropriately reflect the incremental costs SCE&G could avoid as a result of future solar Qualifying Facility purchases. *See also* 18 C.F.R. § 292.304(a)(2) ("[n]othing ... requires any electric utility to pay more than the avoided costs for purchases" from Qualifying Facilities). For this reason, and because the record contains substantial evidence to support the PSC's approval of SCE&G's proposed avoided capacity costs, the PSC's decisions should be affirmed.

IV. THE PSC DECISION COMPLIED WITH ALL STATUTORY, REGULATORY, AND LEGAL REQUIREMENTS AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD.

Throughout the remaining portion of their Brief, the Conservation Groups restate a number of the same issues addressed above but these claims are without merit for the same reasons discussed above and the PSC decisions should be affirmed. However, the Conservation Groups do identify certain additional issues which warrant further response. In addition, certain

[25] The Conservation Groups and the Solar Alliance repeatedly claim that the purpose of PURPA is to encourage competition in the market to generate electricity. *See* Conservation Groups Init. Br. pp. 4-5; Solar Alliance Init. Br. pp. 4, 13. While there may be competition between one Qualifying Facility that executed a power purchase agreement with a higher avoided cost and one that executed a power purchase agreement later in the process with a lower avoided cost, any claims that PURPA was intended to allow Qualifying Facilities to compete with electric utilities is patently false. The only citation to PURPA relied upon by either the Conservation Groups or the Solar Alliance is 16 U.S.C.A. § 824a-3, which makes no mention of requiring electric utilities to purchase electricity from Qualifying Facilities for the purpose of encouraging competition. In fact, on multiple occasions, courts have held that the purpose and intent of PURPA is not to promote competition, but to conserve energy and reduce American reliance on foreign oil. *See Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1204 (W.D.N.Y. 1995) ("In enacting PURPA, Congress was not concerned with fostering competition for competition's sake, but with energy conservation."); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F.Supp. 1345, 1373 (N.D.Ga.1986) ("In establishing PURPA, ... Congress did not intend to place qualifying facilities in competition with public utilities.... Qualifying facilities are not authorized under PURPA to sell at retail.... [T]hey are not competitors of public utilities."), *aff'd*, 844 F.2d 1538 (11th Cir.1988).

issues raised by the Conservation Groups and the Solar Alliance were not preserved for appellate review.

A. Neither SCE&G nor the PSC deviated from past practice and approved methodology.

Notwithstanding the fact that the record contains substantial evidence to support the PSC's decision, the record also makes clear the focus of the Conservation Groups' complaint is not actually the methodology employed by SCE&G, which did not change, but the resulting zero value for avoided capacity costs. The Conservation Groups assert that the PSC "approved an unsupported departure from past practice and approved methodology" without substantial evidence.[26] Specifically, the Conservation Groups claim that the PSC 1) failed to "analyz[e] the appropriateness of the proposed change in the seasonal allocation of the annual capacity value—from 80% summer and 20% winter last year, to effectively a 0% summer and 0% winter split this year," 2) "failed to comply with the previous methodology and failed to present a rationale for moving away from the past allocation of avoided capacity rates that accounted for peaks in both summer and winter periods," and 3) failed to "justify[] the departure from the past methodology

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[26] Contrary to the Conservation Groups' characterizations, in *Heater of Seabrook* this Court concluded that the PSC should not have treated availability fees as revenue when the evidence did not support a departure from its prior practice of treating them as contributions in aid of construction. *Heater of Seabrook*, 324 S.C. at 61, 478 S.E.2d at 828. This Court found that the PSC's ruling – based on the ratemaking principle that operating revenues should match operating expenses – was erroneous because the evidence showed that the total amount of unmatched expenses was "negligible, at best" rendering "illusory" the factual basis for the PSC's determination. Stated another way, the PSC's ruling there was grounded in a lack of substantial evidence to support the departure. Here, the record contains substantial evidence to support such a departure in the 875 MW of solar generation under new power purchase agreements with SCE&G.

Notably, Appellants also do not mention this Court's subsequent decision in *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.*, 332 S.C. 20, 503 S.E.2d 739 (1998) ("*Heater II*"). There, the Court admonished the PSC for ignoring the instructions in *Heater of Seabrook* that the PSC "employ a [rate-setting] methodology tailored to the facts" and for "sticking with precedent" to continue using operating margin as the method by which the utility's rates were set. *Heater II*, 332 S.C. at 25, 503 S.E.2d at 741. *See also id.*, 332 S.C. at 26, 503 S.E.2d at 752 (quoting *Hamm* ("[t]he declaration of an existing practice may not be substituted for an evaluation of the evidence" and "[a] previously adopted policy may not furnish the sole basis for the Commission's action."). This "sticking with precedent" is exactly what Appellants propose when arguing for the continued use of the 2017 avoided costs without updating them for changed circumstances.

of providing payments for [Qualifying Facilities] that avoided capacity in either winter or summer seasons," Conservation Groups Init. Br. p. 24; *see also id.* at 35.

As reflected in the testimony of Ms. Glick, the methodology identified by the Conservation Groups as being the "previous methodology" included a three-step analysis: 1) calculate the avoided capacity value over a 15-year planning horizon using a difference in revenue requirement methodology; 2) identify the set of critical peak hours where energy would have a capacity value on the system and spread the avoided capacity cost across those hours; and 3) calculate a single avoided cost value based on the production of a typical solar system. [Tr. Vol. 1, p. 385, l. 9 – p. 387, l. 11, R. ___.] Regarding step 1, the record reflects that SCE&G did in fact calculate the avoided capacity value over a 15-year planning horizon using a difference in revenue requirements methodology as advocated by Ms. Glick. *See* Section II.A, *supra;* tr. Vol. 1, p. 438. ll. 16-18; R. ___, (Ms. Glick recognizing that SCE&G is "still using a difference-in-revenue-requirement methodology"). As explained by Dr. Lynch and discussed in detail above, that value was zero because the addition of 100 MW of incremental solar generation would not allow SCE&G to avoid any additional capacity.

Regarding step 2, in prior years, SCE&G "identif[ied] the set of critical peak hours where energy would have a capacity value on the system and *spread the avoided capacity cost* across those hours." [Tr. Vol. 1, p. 386, ll. 1-3, R. ___. (emphasis added.)] For example, in 2016, SCE&G "determined the critical peak hours by analyzing the hours when its load fell within 95% of seasonal peak in the last 15 years." [Tr. Vol. 1, p. 386, ll. 4-6, R. ___.] At that time, the winter hours comprised "approximately 20% of the total" and "[a]ccordingly, SCE&G assign[ed] 80% of the annual avoided capacity cost … to the summer and 20% to the winter based on the number of hours occurring in each critical peak season." [Tr. Vol. 1, p. 386, ll. 7-12, R.___.]

In this proceeding, however, there were no avoided capacity costs to spread across the critical peak hours. Therefore, there was no need for SCE&G to identify a set of critical peak hours where energy would have a capacity value on the system and spread capacity costs across those hours. *See* Tr. Vol. 1, p. 438, ll. 20-23, R.___ ("[W]hat's being asserted is the resource plan can't change because solar cannot avoid any capacity in winter; therefore, no more calculations are required"). Similarly, no adjustment needed to be made to the avoided energy and avoided capacity costs to calculate a single value because there were no avoided capacity costs. *See Shealy v. S.C. Dep't of Soc. Servs.*, 334 S.C. 187, 192 n.6, 511 S.E.2d 713, 715 n.6 (Ct.App.1999) ("The law does not require the doing of a futile act.") *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). *Cf. Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 424, 593 S.E.2d 462, 467 (2004) (reversing a circuit court dismissal of a declaratory judgment action that would have required a litigant to "exhaust[] a remedy that does not exist" and holding that "a party is not required to spend time and money complying with what allegedly is an invalid or unconstitutional ordinance").

Simply put, in order for there to be an allocation of annual capacity value between summer and winter, there has to be an annual capacity value to allocate. In approving SCE&G's proposal as reasonable, the PSC properly found based upon a preponderance of the evidence that because the addition of an incremental 100 MW of solar generation would not have any impact on SCE&G's need to add future capacity, SCE&G's avoided capacity cost is zero. [Order No. 2018-322(A), p. 15, R.___.] *See 330 Concord St. Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 517, 424 S.E.2d 538, 540 (Ct.App.1992) (finding that an administrative agency does not act arbitrarily in failing to follow prior decisions where there are distinguishing factors between the cases); Order No. 2018-322(A), p. 25 ("Avoided capacity costs should be calculated based on

how much future capacity can be avoided and, if no such capacity can be avoided, the avoided capacity cost should be zero."). Even had the PSC allocated the zero avoided capacity costs between summer and winter as the Conservation Groups suggest, this futile exercise would have resulted in the same result—a capacity value of zero for both seasons.

The Conservation Groups therefore can advance no plausible basis upon which this Court could conclude that the PSC and SCE&G improperly deviated from the previously approved methodology. Because the PSC "is considered the 'expert' designated by the legislature to make policy determinations regarding utility rates," *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (citations omitted) and because there is substantial evidence in the record to support a finding that SCE&G applied an appropriate methodology, the PSC's decision therefore should be affirmed.

B. SCE&G was not required to consider energy efficiency or demand side resource programs that had not been approved by the PSC.

In support of its claim that solar Qualifying Facilities should be compensated for capacity provided in the summer, the Conservation Groups also assert that SCE&G "could choose separate capacity resources to meet ... seasonal capacity needs," referencing the possibility that SCE&G could use "a winter peaking energy efficiency resource and a solar [Qualifying Facility]" or a demand side management program. Conservation Groups Init Br. p. 26. This claim, ignores, however, that energy efficiency and demand side management programs are subject to approval by the PSC as part of a separate proceeding in which the PSC has to consider the cost effectiveness, environmental acceptability, and reduction of energy consumption or demand of such energy supply and end-use technologies. S.C. Code Ann. § 58-37-20 (2015). The record does not reflect any evidence, much less substantial evidence, suggesting what kind of program could reasonably be expected to provide the type of winter capacity reductions

suggested by the Conservation Groups. Instead, they ask this Court to find that the PSC erred by not concluding that because some hypothetical program somehow, someday may provide these benefits SCE&G was required to make those assumptions so that incremental solar providers would receive additional compensation, the costs of which would be borne by SCE&G's customers. This recommendation therefore must be rejected as amounting to no more than rank speculation. *See Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. at 205, 51 S.E.2d at 749.

C. The PSC properly declined to approve a reserve margin for SCE&G based upon the reserve margins of other utilities.

The Conservation Groups also criticize the PSC's approval of SCE&G's winter reserve margin, citing Ms. Glick's testimony that SCE&G proposed winter reserve margin of 21% "is much higher than the 12% to 17% margins of comparable utilities and that SCE&G generated the margin using a non-industry standard method." Conservation Groups Init. Br. p. 27; *see* tr. Vol. 1, p. 389, ll. 12-14, R.___.[27] However, this Court has "held on several occasions that it is improper for the [PSC] to draw comparisons with other entities without stating its basis for finding the entities sufficiently similar for comparison purposes." *USSC*, 392 S.C. at 114, 708 S.E.2d at 765; *see also Heater II*, 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998). To this point, there is nothing in the record suggesting the utilities identified by the Conservation Groups have peak demands, generating facilities, solar generation interconnections, or future capacity needs

[27] Even so, as recognized by the PSC, Dr. Lynch disagreed with Witness Glick's suggestion that SCE&G's winter reserve margin was unreasonable when compared to those of other utilities. Dr. Lynch testified that PJM Interconnection LLC, a regional transmission organization that oversees the electricity grid in all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia, *see Hughes v. Talen Energy Mktg.*, LLC, __ U.S. __, __, 136 S. Ct. 1288, 1293 (2016), has a 16% summer reserve margin and a 27% winter reserve margin, both of which are greater than SCE&G's current summer and proposed winter reserve margin. [Tr. Vol. 1, p. 248, ll. 12-15, R.___.] He also testified that Florida electric utilities plan to a 20% reserve margin, which likely refers to a summer reserve margin, but that SCE&G's demand side risk is greater in winter than in summer. [*Id.*] Accordingly, SCE&G further substantiated its claims that its proposed reserve margin was reasonable, which constitutes substantial evidence to support the PSC's finding in this regard.

comparable to those of SCE&G such that there could be a comparative basis upon which the PSC could set just, reasonable, and appropriate avoided costs for SCE&G.[28]

D. The PSC's approval of SCE&G's proposed avoided costs does not violate federal law.

For the same reason that the record contains substantial evidence to support the PSC's decision, there also is no basis to support the Conservation Groups' claims that setting a zero value for SCE&G's avoided capacity cost violates federal law. As the Conservation Groups do recognize, avoided costs "must reflect the cost that the purchasing utility *can avoid* as a result of obtaining energy and capacity from these [Qualifying Facilities]." Conservation Groups Init. Br. p. 20 (citing 18 C.F.R. § 292.101(b)(6)). And in fact, the record fully supports the PSC's decision that incremental solar Qualifying Facilities will not allow SCE&G to avoid any of its future capacity needs. *See* discussion *supra* Section II. This "clear relationship" between the capacity provided by incremental solar generation and SCE&G's ability to avoid future generation capacity demonstrates the reasonableness of SCE&G's avoided capacity costs as determined by the PSC.[29]

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[28] The Conservation Groups' vague assertions that SCE&G used a "non-industry standard method" to calculate its winter reserve margin also does not show the PSC's decision was "clearly erroneous." S.C. Code Ann. § 1-23-380(5) (Supp.2018). Simply because there may be another method to calculate a utility's reserve margin is not evidence that the methodology used will yield an unreasonable result. *See* Conservation Groups Init. Br. p. 28, n. 25 (quoting Mr. Horii's testimony that "it is *unclear* if the component methodology is appropriate.") (Emphasis added).

[29] FERC's decisions in *Windham Solar LLC & Allco Fin.. Ltd.* and *Hydrodynamics, Inc.* also are not supportive of the Conservation Group's position. *See* Conservation Group Init. Br. p. 31. In *Windham Solar*, the Connecticut Public Utilities Regulatory Authority concluded a utility had no need for capacity because its capacity needs were satisfied through a capacity auction. FERC found, however, that, **"to the extent [the utility's] capacity needs can be satisfied** by Windham's [Qualifying Facilities] rather than through the capacity auction, the avoided cost rates ... should include an estimate of [the utility's] avoided cost of capacity." *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016) (emphasis added). In *Hydrodynamics*, the Montana Public Service Commission required a utility to establish a 50 MW cumulative installed capacity limit for all Qualifying Facilities. However, FERC found that the 50 MW capacity limit had no clear relationship to the utility's actual demand for capacity. *Hydrodynamics Inc.*, 146 FERC ¶ 61193, 61846 (Mar. 20, 2014). In addition, *Hydrodynamics* specifically referenced a prior FERC decision in *City of Ketchikan, Alaska*, 94 FERC ¶ 61,293 (2001) which recognized "an avoided cost rate need not include capacity unless the [Qualifying Facility] purchase will permit the purchasing

Moreover, the Conservation Groups do not identify any substantive evidence demonstrating that SCE&G's resource plan is deficient in any way or that there is a lower cost alternative that exists. They argue that the avoided capacity costs violate federal law because SCE&G did not "optimize" its resource plan. Conservation Groups Init. Br. p. 37. But the only evidence cited by the Conservation Groups in support of this contention is their complaint that, because SCE&G's plan was reflected on an Excel spreadsheet instead of being the product of "optimization modeling software," Conservation Groups Init. Br. p. 39, it is a "simple spreadsheet approach [that] is at odds with accepted industry practice" and therefore must be sub-optimal. Conservation Groups Init. Br. p. 40.

However, there is no substantial evidence in the record to support a finding that SCE&G's resource plan is not an "optimal capacity expansion plan." In fact, the Integrated Resource Plan reflects a detailed "resource plan that will provide reliable and economically priced energy to the Company's customers while complying with all environmental laws and regulations." [Hr'g Ex. 9 p. 3, R.___.] It also sets forth a program to meet SCE&G's 15-year demand and energy forecast "in an economic and reliable manner, including both demand-side and supply-side options, ... cost-benefit [analyses], ... the effect of the plan on the cost and reliability of energy service, ... and ... the external environmental and economic consequences of the plan ...." S.C. Code Ann. § 58-37-10 (2015); *see generally* Hr'g Ex. 9, R.___. Using this plan, SCE&G calculated its proposed avoided costs "based on projections of load, resource needs, fossil fuel prices," and other similar system needs and costs. [Tr. Vol. 1, p. 213, ll. 12-13,

utility to avoid building or buying future capacity." *City of Ketchikan*, 94 FERC ¶ 61293 (Mar. 15, 2001). Accordingly, these decisions recognize Qualifying Facility purchases should include a payment for avoided capacity if the purchase allows a utility to avoid future capacity needs. Here, however, 100 MW of additional solar generation will not allow SCE&G to avoid the addition of future capacity and its zero proposed avoided capacity cost bore a clear relationship to its actual demand for capacity. Thus, the PSC properly found, in compliance with federal law, that SCE&G's avoided capacity costs were zero.

R.___.] Contrary to the Conservation Groups' assertions, the record therefore reflects that SCE&G's Integrated Resource Plan is an optimal capacity expansion plan as contemplated by Order No. 69. *See* Conservation Group Init. Br. at 37; *see also* tr. Vol. 1, p. 479, l. 2 – p. 484, l. 1 (Dr. Lynch discussing the options considered in the resource plan and that it was developed with dispatch simulation model software known as PROSYM).

Accordingly, the record contains substantial evidence demonstrating SCE&G's plan complied with federal requirements and this Court should reject the Conservation Groups' baseless claims of error based solely on hypotheticals and inferences.

E. The Conservation Groups' and the Solar Alliance's complaints regarding discovery, the procedural schedule, and the format of the PSC's orders are not preserved for appellate review and, in any event, are unavailing.

Finally, SCE&G submits that the Conservation Groups' and the Solar Alliance's arguments regarding discovery, the timeline adopted by the PSC for the proceedings below, and the PSC's alleged failure to set forth sufficient findings of fact have not been preserved for appellate review, and in any event are without merit.

1. The Conservation Groups and the Solar Alliance did not appeal the PSC's decisions regarding discovery and scheduling and failed to avail themselves of their discovery rights.

In an apparent (and revealing) effort to overcome their failure to present a reliable avoided capacity cost estimate, the Conservation Groups and the Solar Alliance complain that they had insufficient time to develop discovery. Conservation Groups Init. Br. pp. 17-18; Solar Alliance Init. Br. p. 19. However, the PSC addressed and properly rejected both of these issues in Order Nos. 2018-42-H and 2018-44-H.

In Order No. 2018-42-H, the PSC Hearing Officer considered a request filed by the Conservation Groups seeking to require SCE&G to include, in its pre-filed testimony in Docket

No. 2018-2-E, an update to Rate PR-2 using the methods approved by the PSC in prior orders, which included an avoided "capacity value based on the frequency with which electric load was within 95% of seasonal peak." [Conservation Groups Pet. for an Order Requiring SCE&G to Comply with Order No. 2018-55 p. 6, R.___.][30] In denying this request, the Hearing Officer concluded that there is no provision in Order No. 2018-55 requiring "SCE&G to file an updated PR-2 rate based on a specific methodology." [Order No. 2018-42-H p. 3, R.___.] The Conservation Groups thereafter filed a Petition to Reconsider the decision in Order No. 2018-42-H. [Conservation Groups April 6, 2018 Pet. to Recons., R.___.] The Hearing Officer denied this Petition as well finding that SCE&G provided information regarding avoided energy costs "for PR-2 under the methodology approved in Docket No. 2017-2-E and other information related to SCE&G's calculated avoided energy costs," which "meant that [the Conservation Groups] had the ability and information to propose alternate rates in their direct testimony" but chose not to do so. [Order No. 2018-44-H p. 2, R.___.]

Similarly, the Solar Alliance filed a Motion to Bifurcate Issues requesting that the PSC bifurcate the issues of updates to SCE&G's Rate PR-2 and the avoided cost methodology from the consideration of the Company's other fuel costs. [Mot. to Bifurcate Issues, p. 2, R.___.] In support of this Motion, the Solar Alliance asserted that its witness "was unable to provide comprehensive, responsive Testimony" on these issues "in the time allowed for his Testimony Preparation." [*Id.*]. On April 4, 2018, denied the Motion to Bifurcate, noting that prior orders of the PSC and S.C. Code Ann. § 58-27-865(A)(2)(c) required consideration of avoided costs and adjustments to Rate PR-2 in the Company's annual fuel proceeding. [Order No. 2018-267 at 1,

[30] The Conservation Groups filed this request in Docket No. 2017-2-E, which pertained to SCE&G's 2017 annual fuel cost review proceeding. However, the order issued by the Hearing Officer denying the request was issued in both Docket Nos. 2017-2-E and 2018-2-E. [Order No. 2018-42-H, R.___.]

R.___.]. The Solar Alliance thereafter filed a Petition for Rehearing and/or Reconsideration requesting the PSC to reconsider "the single issue" of bifurcating issues regarding SCE&G's avoided cost methodology from the proceeding. [Solar Alliance Pet. for Reh'g or Recons., dated April 6, 2018, p. 3, R.___.] At the outset of the merits hearing in this matter, the PSC denied the Petition on the basis that "this fuel case is an entirely appropriate context for" determinations relating to avoided costs and updates to Rate PR-2 and that the Solar Alliance "received the benefit of accelerated discovery production and additional time to file testimony," which should have resolved [the Solar Alliance's] reservations as to the procedure of (*sic*) schedule." [Tr. Vol. p. 12, ll. 21-24, R.___. tr. Vol. p. 14, l. 21 – p. 15, l. 5, R.___.]

None of these decisions of the PSC were identified in nor attached to the Notices of Appeal filed by the Conservation Group and the Solar Alliance. [Conservation Groups June 21, 2018, Notice of Appeal; Conservation Groups Am. Notice of Appeal; Solar Alliance Notice of Appeal.] Therefore, these decisions are the law of the case and they are not subject to review on appeal. *See* Rule 203(d)(2)(B)(ii), SCACR (stating that a notice of appeal from an administrative tribunal shall include "[a] copy of the decisions to be challenged on appeal").

Even so, the Conservation Groups and the Solar Alliance's complaints regarding discovery fall flat. As noted by the PSC, it "did not receive any Motion to Compel nor any other indication of disputes in the discovery process, prior to the hearing." [Order No. 2018-322(A), p. 16.]. *See* S.C. Code Ann. Regs. 103-835 (2012) ("The S.C. Rules of Civil Procedure govern all discovery matters not covered in [PSC] Regulations."); Rule 37(a), SCRCP (providing a party may move for an order compelling an answer or inspection to an interrogatory or request for inspection); *see also Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984) ("It is well-settled that "the scope and conduct of discovery are within

the sound discretion of the trial court ..., and that after final judgment of the ... final agency order, [the Court's] review is confined to determining if that discretion has been abused....") (quoting *Marroquin-Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3rd Cir. 1983). The PSC also expressed its understanding that "all discovery issues were actually resolved prior to the hearing," noting that the parties "advised the [PSC] of an agreement ... that the company and the parties had resolved their differences" as a result of "a commitment from SCE&G to provide discovery responses prior to their due date and to agree to an extension of [the Solar Alliance and other parties'] prefiled testimony deadlines" [Order No. 2018-322(A), p. 16, R.___.] The record therefore does not support the Conservation Groups' and the Solar Alliance's contentions and, instead, shows that they and all other parties "received the benefit of accelerated discovery production and additional time to file testimony."

2. *The Conservation Groups' and the Solar Alliance's claims that the PSC failed to make sufficient findings of fact are not preserved for review and, even so, the PSC's order makes sufficiently detailed findings for this Court's review.*

The Conservation Groups and the Solar Alliance also did not preserve for review their complaints that the PSC Orders do not contain sufficient findings of fact. [Conservation Groups Init. Br. p. 23; Solar Alliance Init. Br. p. 21.] In their Petition for Rehearing or Reconsideration, the Conservation Groups mentioned the statutory and legal requirements regarding findings of fact in only a perfunctory manner, but failed to identify any portions of Order No. 2018-322(A) that failed to satisfy these requirements. [Conservation Groups Pet. for Reh'g or Recons. pp. 8-10, R.___.] And the Solar Alliance failed to mention the matter at all in its Petition for Rehearing or Reconsideration. *See generally* Solar Alliance Pet. for Reh'g or Recons., R.___. Because Appellants failed to identify these issues with specificity, or at all, they are not preserved for review by this Court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295,

301–302, 641 S.E.2d 903, 907 (2007) (To preserve an issue for appeal, it must be: "'(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'") (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)).

Nevertheless, the question regarding the sufficiency of an administrative agency's order is whether the decision sufficiently explains its reasoning and whether the findings of fact are supported by the evidence. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 338 S.C. 92, 95–96, 525 S.E.2d 863, 865 (1999); *Porter*, 333 S.C. at 21, 507 S.E.2d at 332 ("An administrative agency is not required to present its findings of fact and reasoning in any particular format.").

As reflected in Order No. 2018-322(A), the PSC properly documented the evidence of record and made appropriate findings of fact that SCE&G's proposed reserve margin and avoided capacity cost value were appropriate. *See* Order No. 2018-322(A), pp. 4-18, R.___. After setting forth its detailed reasoning for these findings, the PSC went on to address additional evidence presented by the parties. While certain aspects of this discussion did reflect descriptions of the testimony presented by both sides, in each instance identified by the Conservation Groups and Solar Alliance, the conclusion reached by the PSC as to those specific issues was borne out of its encompassing conclusion that an avoided capacity cost of zero was reasonable. In short, the Conservation Groups and the Solar Alliance selectively cite minor portions of the Order and view them in isolation to suggest error by the PSC. When viewed as a whole, however, the entire record and order makes clear the PSC, after considering all of the evidence presented by the parties, determined the avoided capacity costs recommended by SCE&G were just, reasonable,

and appropriate, and should be implemented for incremental solar generation. The PSC's decisions therefore should be affirmed.

CONCLUSION

For the reasons explained above, this Court should deny Appellants' appeal and affirm the orders of the PSC.

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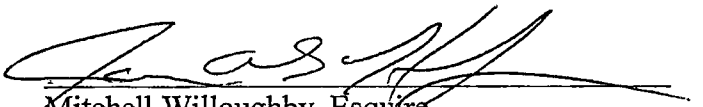

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